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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

Estate of ERVIN L.SMITH, Deceased.

STACY M. SMITH,

Appellant,

v.

VERDELL SMITH JOHNSON,

Respondent.

A122974

(Sonoma County  
Super. Ct. No. SPR 80142)

**POLLAK, J.**—Stacy M. Smith appeals from an order removing her as the administrator of the estate of Ervin Smith after DNA testing determined that she was not the decedent’s biological daughter. She contends the probate court abused its discretion in removing her as the administrator without cause and without a hearing. We conclude that the court acted within its discretion under Probate Code<sup>1</sup> section 8503 and affirm the order.

**Background**

On November 17, 2007, Ervin Smith passed away intestate. On December 28, Stacy Smith, claiming to be the decedent’s daughter, petitioned to administer his estate and requested general letters of administration. On January 8, 2008, Verdell Smith Johnson, the decedent’s sister, filed a petition for letters of administration requesting that she be appointed administrator rather than Smith. Johnson disputed Smith’s claim that she was the decedent’s child. According to Johnson, the decedent “had no contact with [Smith] until three years before his death” and he “had lingering doubts that he was Stacy

<sup>1</sup> All statutory references are to the Probate Code unless otherwise noted.

Smith's father." Smith "learned that [the decedent] was named on her birth certificate and tracked him down. [The decedent] repeatedly expressed to [her] and other family members that he has doubted his paternity. [Smith] was on welfare and was constantly seeking loans from Mr. Smith. He felt she was financially irresponsible and using paternity as a pretext to extract money from him." Smith submitted a copy of her birth certificate, which named the decedent as her father. Following a contested hearing, the court appointed Smith as administrator and issued her letters of administration.

On April 15, 2008, Johnson filed an ex parte petition seeking to have Smith removed as administrator. At the same time she filed a petition to determine entitlement to distribution from the estate. Again, Johnson disputed that Smith was the decedent's daughter. Smith opposed the motions. The ex parte petition to have Smith removed as administrator was denied without a hearing. The petition to determine distribution of the estate was heard on May 28. At the hearing, the parties stipulated that Smith would submit to DNA testing to establish paternity. The test results established that Smith is not the decedent's biological daughter.

On August 27, 2008, the court held a second hearing on Johnson's petition to establish distribution of the estate. At that hearing, the court removed Smith as administrator and appointed Johnson. The court explained that Smith was being removed, "not because of cause, simply because Miss Johnson is obviously a blood relative . . . ." The court believed that by appointing "Verdell Johnson as administrator, then the case can move forward." Smith filed a timely notice of appeal.

On November 17, 2008, while this appeal was pending, the probate court held an evidentiary hearing to determine whether Smith is the decedent's natural child within the meaning of section 6453 irrespective of the DNA results.<sup>2</sup> On December 3, the court

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<sup>2</sup> Section 6453 provides: "For the purpose of determining whether a person is a 'natural parent' as that term is used in this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code). [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may

issued an order finding that Smith failed to meet the heavy burden of establishing by clear and convincing evidence that the decedent received her into his home and openly held her out as his natural child and therefore that she is not entitled to distribution from the decedent's estate.<sup>3</sup>

### **Discussion**

Section 8500 sets forth the procedure for removing an administrator as follows: “(a) Any interested person may petition for removal of the personal representative from office. A petition for removal may be combined with a petition for appointment of a successor personal representative under Article 7 (commencing with Section 8520). The petition shall state facts showing cause for removal. [¶] (b) On a petition for removal, or if the court otherwise has reason to believe from the court's own knowledge or from other credible information, whether on the settlement of an account or otherwise, that there are grounds for removal, the court shall issue a citation to the personal representative to appear and show cause why the personal representative should not be removed. The court may suspend the powers of the personal representative and may make such orders as are necessary to deal with the property pending the hearing.

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not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence. [¶] (c) A natural parent and child relationship may be established pursuant to Section 249.5.”

<sup>3</sup> On our own motion, we take judicial notice of the December 3 order and the superior court register of actions as of April 7, 2009. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).) After reviewing supplemental briefing submitted by the parties submitted at our request, we conclude that while Smith has no right to inherit the estate or to be reinstated as administrator, the appeal is not moot because Smith incurred attorney fees defending her appointment prior to the entry of the December order which she might be entitled to recover if the removal order were to be reversed. (§ 10811, subd. (a); Cal. Rules of Court, rule 7.703(c)(7) [listing the “[s]uccessful defense of a personal representative in a removal proceeding” as an activity for which extraordinary compensation may be awarded to the attorney for the personal representative].)

[¶] (c) Any interested person may appear at the hearing and file a written declaration showing that the personal representative should be removed or retained. The personal representative may demur to or answer the declaration. The court may compel the attendance of the personal representative and may compel the personal representative to answer questions, on oath, concerning the administration of the estate. Failure to attend or answer is cause for removal of the personal representative from office. [¶] (d) The issues shall be heard and determined by the court. If the court is satisfied from the evidence that the citation has been duly served and cause for removal exists, the court shall remove the personal representative from office.” Due process requires that “[b]efore an executor is removed he must be accorded a hearing and the court must have some fact legally before it in order to justify removal. The facts relied on for removal must be established by evidence, and any proper evidence which tends to establish or refute the charges relied on is admissible.” (*Estate of Buchman* (1954) 123 Cal.App.2d 546, 559.) Generally, “[w]here the statute prescribes the steps necessary to be taken to remove an executor, the statutory requirements must be complied with, and an order of removal not predicated on such compliance is unauthorized and ineffectual.” (*Ibid.*) However, the failure to comply with the statutory procedure for removing an administrator is not prejudicial if the former administrator has actual notice of the hearing, participates at the hearing and is “fully heard upon the merits of the petition with opportunity to adduce all material evidence.” (*Estate of Palm* (1945) 68 Cal.App.2d 204, 213.)

In this case, the court failed to comply with the statutory procedure by not issuing a formal citation. However, Smith was given ample notice of Johnson’s claim that Smith should be replaced because she was not the decedent’s daughter and Smith appeared at the hearing with counsel and argued in opposition to her removal on the merits. Although she requested an evidentiary hearing to establish whether she qualified as a natural child under the Family Code, at no point did she object to the court’s failure to follow the statutory procedure for removal. By failing to object, Smith waived any claim relating to the court’s failure to comply with the procedural requirements. (*Estate of Palm, supra*, 68 Cal.App.2d at pp. 213-214 [“voluntary participation in proceedings . . . waived the

informality of the issuance of the citation”].) In any event, the proceedings clearly comported with the requirements of due process (*Estate of Buchman, supra*, 123 Cal.App.2d at pp. 560-561) and any failure to comply precisely with the statutory procedure was harmless (*Estate of Palm, supra*, 68 Cal.App.2d at p. 213).

Contrary to Smith’s argument, the court did not remove her as administrator without cause. While the court indicated that the removal was “not because of cause,” we understand the court’s comment to mean that Smith was not being removed because she had engaged in misconduct in the administration of the estate. That does not mean that there was not a proper basis for her removal. As the trial court explained, Smith was removed because the DNA test established that Smith was not the decedent’s biological daughter. The court stated, “I, of course, thought the DNA test would solve this but apparently it didn’t. . . . [¶] . . . [W]hat I would suggest is you try to work something out . . . . Obviously Miss Smith thought she was the daughter of the decedent, and whether he held her out as such or not, that’s something you can either litigate or you can come to some kind of an agreement, but in the meantime, I think that if I appoint Verdell Johnson as administrator, then the case can move forward.”

Under Section 8503, subdivision (a), “an administrator may be removed from office on the petition of the surviving spouse or a relative of the decedent entitled to succeed to all or part of the estate, or the nominee of the surviving spouse or relative, if such person is higher in priority than the administrator.” Removal under this section does not require a showing of fault by the administrator. It is sufficient that Johnson as the decedent’s sister had a superior right to appointment. (1 Gold et al., Cal. Civil Practice: Probate & Trust Proceedings (2009) Opening Formal Probate, § 9:51, p. 9-46 [“The court may . . . remove an administrator based on the petitioner’s priority, rather than the representative’s wrongdoing”].) There is no dispute that Johnson had continuously sought that appointment and it was within the court’s discretion to determine that her appointment was the best way to accomplish a timely resolution of the proceedings.

Smith argues that section 8503 does not support the court’s ruling because “at the time of Smith’s removal it was not determined which party was ‘higher in priority.’ ” She

argues that the court did not have authority to remove her as administrator under section 8503 without first making a determination as to whether she was the decedent's natural child irrespective of the DNA results. It was, however, Smith's burden to establish that she was the decedent's natural child and at the time of her removal she had not presented sufficient evidence to support that claim. Thus, at the time of the removal, the trial court reasonably determined that Johnson had the higher priority. Section 8503 does not require the court to resolve all disputed claims prior to determining priority for the purpose of appointment.

### **Disposition**

The order removing Smith as administrator of the decedent's estate is affirmed. Johnson shall recover her costs on appeal.

McGuinness, P.J., and Jenkins, J., concurred.